No. 82-2084

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE W. PHILLIPPI and
AVA PHILLIPPI, his wife,

Petitioners

v.

BECHTEL ASSOCIATES PROFESSIONAL
CORPORATION, D.C., *et al.*,

Respondents

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether petitioners can escape the six month limitation of § 33(b), Longshoremen's and Harbor Workers' Compensation Act, on the basis of a conflict of interest, where the same insurance carrier provided both compensation insurance and liability coverage.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the *per curiam* Judgment of the United States Court of Appeals for the District of Columbia Circuit (Appeal No. 82-1615), which affirmed the judgment of the United States District Court for the District of Columbia, granting summary judgment for defendants Bechtel, on the basis of the Opinion of the District Court; and the orders of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing and denying suggestion for rehearing *en banc*.

OPINIONS BELOW

The Order of the United States District Court granting summary judgment for respondent, dated April 28, 1982,

appears as Petitioners' Appendix C. The judgment of the United States Court of Appeals for the District of Columbia Circuit, dated February 24, 1983, appears as Petitioners' Appendix B. The orders of the United States Court of Appeals for the District of Columbia Circuit denying the petition for rehearing, and denying the suggestion for rehearing *en banc* appear as Petitioners' Appendix A.

All of the foregoing orders are unreported. The Order of the United States District Court, for the District of Columbia, in *Jenkins* v. *Bechtel Associates Professional Corporation*, Civil Action 81-2236 (D.D.C. February 23, 1982), cited and incorporated by reference in the opinion of the District Court appears as Respondents' Appendix A. The Order of the United States Court of Appeals for the District of Columbia Circuit which granted a motion by respondents Bechtel to strike the reply brief sought to be filed by petitioners appears as Respondents' Appendix B. The Table of Contents of the stricken reply brief appears as Respondents' Appendix C.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1)(1976). Respondents do not disagree with the applicability of that provision.

With respect to the time factors upon which jurisdiction may rest, petitioners apparently rely upon Rule 11 of the Rules of this Court, and upon 28 U.S.C. § 2101(c), although same are not specifically cited by petitioners. Respondents do not controvert the petition on the basis of timely filing.

RELEVANT STATUTES

Respondents agree that the relevant statutory provisions include the following, set forth by petitioners:

District of Columbia Code § 36-501
United States Code Title 28, § 1254(1)
United States Code Title 33, § 933(b)(pre 1959 and post 1959 amendment versions)

Respondents also cite:
District of Columbia Code § 36-301, et seq. and 335 (1981 ed.)

Respondents do not agree that other provisions cited by petitioners are relevant to the issues presented.

STATEMENT OF THE CASE

George W. Phillippi, a miner and concrete foreman, alleged an occupationally-related lung disease, allegedly discovered in June, 1978, while he was employed by a contractor on the Washington Metro subway project. He retained the same counsel who now represent him in this action, and filed a compensation claim against Ball-Healy-Granite, as his employer, in 1978.

On September 4, 1980, petitioner received an award of benefits under the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as the Act), 33 U.S.C. § 901 et seq., made applicable in the District of Columbia by D.C. Code § 36-501 et. seq.

The action against the Bechtel defendants, general construction consultants for Washington Metropolitan Area Transit Authority (hereinafter referred to as WMATA) was not filed by plaintiffs until May 18, 1981.[1]

Defendants Bechtel moved for dismissal or summary judgment, on the grounds that Mr. and Mrs. Phillippi are barred from pursuing the action, since the right to pursue any third party action was assigned to the employer of Mr. Phillippi, or its compensation insurance carrier under subrogation principles, six months after the date of the award, pursuant to the provisions of § 33(b) of the Act. The motion was granted, with a Memorandum Opinion by Honorable Louis F. Oberdorfer, and judgment entered for defendants.

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[1] Respondents specifically disagree with the characterization of the responsibilities of defendants, at Petition, pp. 7-8. These conclusory allegations come from plaintiffs' Complaint in the District Court, and were denied as phrased by respondents.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, petitioners sought to raise, in a Reply Brief, several of the same points, or variations thereof, as found in the Petition for Writ of Certiorari.[2] Upon motion of respondents, the Reply Brief was stricken in its entirety.[3]

As indicated by petitioners, the Court of Appeals then entered judgment affirming the District Court, on the basis of the District Court opinion. Petition for rehearing, and suggestion for rehearing *en banc*, were denied.

SUMMARY OF ARGUMENT

This petition should be denied for a number of reasons.

The petition is based, in part, on arguments, issues, documents and decisions not presented to the District Court and the Court of Appeals. The Court of Appeals ordered a reply brief by petitioners stricken because it sought to introduce new issues. This Court should disregard matters not raised before the Courts below, since their inclusion is not only unfair but prejudicial to respondents.

The only issue before this Court is whether this case presents any "specific evidence of a serious conflict of interest which Congress could not have foreseen when it enacted and amended § 33." *Rodriguez* v. *Compass Shipping Co., Ltd.*, 451 U.S. 596, 618 (1981).

Respondents submit that the District Court and the Court of Appeals have correctly found that the conflict of interest here is almost precisely the same as that found by this Court in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956). The Courts below also correctly held that such a conflict of interest

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[2] The Table of Contents of the stricken Reply Brief appears as Respondents' Appendix C.

[3] The Order of the Court of Appeals striking the Reply Brief appears as Respondents' Appendix B.

not only could have but actually was foreseen by Congress when it amended § 33(b) of the Act in 1959.

Therefore, the reliance of petitioners on the rationale of the *Czaplicki* decision is no longer warranted. Mr. and Mrs. Phillippi are bound by the operation of the six month assignment provision of the statute. There is no evidence of an unforeseen conflict of interest, and the petition must be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Should Be Denied Because It Is Based On Arguments, Issues, Documents And Decisions Not Before The Courts Below.

As noted above in Respondents' Statement of the Case, petitioners sought to rely on arguments and issues, based on documents and decisions not previously in the record, on their appeal of the decision of the District Court. The United States Court of Appeals for the District of Columbia Circuit struck the Reply Brief in which those matters were contained.

The same rationale should be applied upon consideration of this Petition for Writ of Certiorari.

Petitioners, in the Court of Appeals, framed the issue presented for review as follows:

> "Whether an injured employee may prosecute a personal injury action against a third party after his claim has been assigned to this employer pursuant to § 33(b) of the Longshoremen's and Harbor Workers' Act, where the assignee failed to prosecute the assigned claim because of an unusual conflict of interest."

Respondents have conceded throughout that, at all relevant times, Lumberman's Mutual Casualty Company provided compensation coverage to Ball-Healy-Granite, employer of Mr. Phillippi, and liability insurance to respondents.

No reference was made in the courts below to §§ 904(a), 905(a), 933(d), 933(e)(2), 933(e)(1)(A-D), or 938(a), 33 U.S.C. The agreement between WMATA, National Loss Control

Service Company (hereinafter referred to as NATLSCO), and Lumberman's Mutual Casualty Company first appears in Petitioners' Appendix in this Court, and was not before the courts below.

The argument of petitioners found in Section B, Petition, pp. 16-18, was not made before the District Court or the Court of Appeals. Likewise, the characterizations of the WMATA Coordinated Insurance Program found in Section A, Petition, pp. 9-15, were not presented below, and are not based on facts in the record before the Courts below.

Respondents here are two Bechtel entities. WMATA, which allegedly "engineered" the Coordinated Insurance Program (Petition, p. 15) is not a party, nor is NATLSCO, nor Lumberman's Mutual Casualty Company nor Ball-Healy-Granite. To allow petitioners here to characterize the intentions of nonparties is not only prejudicial to respondents, but improper and unfair. Further, to allow petitioners to advance conclusory statements as to what the members of Congress in 1959 did or did not intend in amending the Act, without basis in the record, is likewise improper, unfair and prejudicial to these respondents. Most important, these characterizations, and the Coordinated Insurance Program, are not the issue here.

Matters concerning which there was no record developed in the Court below cannot be considered on appeal. *Moses* v. *Hazen*, 69 F. 2d 842 (D.C. Cir. 1934). Questions neither raised nor considered in the trial court, and which are attempted to be raised for the first time on appeal, will not and should not be considered by the reviewing Court. *Brown* v. *Collins*, 402 F. 2d 209 (D.C. Cir. 1968); *Kassman* v. *American University*, 546 F. 2d 1029 (D.C. Cir. 1976); *Calhoun* v. *Freeman*, 316 F. 2d 386 (D.C. Cir. 1963).

In *Hormel* v. *Helvering*, 312 U.S. 552 (1941), this Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which

they have had no opportunity to introduce evidence." *See also*, *Youakim* v. *Miller*, 425 U.S. 231 (1976); *Hackes* v. *Hackes*, 446 A. 2d 396 (D.C. App. 1982).

Attempts to characterize the intentions of nonparties have no place in the consideration of the real issues of this case, nor do unfounded assertions that a conflict of interest was "deliberately created" to "frustrate" Mr. and Mrs. Phillippi.

The arguments and issues, based on documents and decisions not previously in the record, should be disregarded. Inasmuch as petitioners concede the operative facts and chronology, concede the applicability of the 1981 decision of this Court in *Rodriguez* v. *Compass Shipping Co., Ltd., supra*, and concede that the 1959 amendments of the Act superceded the decision of this Court in *Czaplicki* v. *The Hoegh Silvercloud, supra*, (1956), the Petition should be denied.[4]

II. An Employee May Not Prosecute A Personal Injury Action Against A Third Party After His Right To Do So Has Been Assigned To His Employer Pursuant To § 33(b) Of The Act.

A. Relevant Considerations Supporting Review On Certiorari Are Not Present In This Case.

Petitioners address themselves to the discretion of this Court. Rule 17, Rules of the Supreme Court of the United States, sets forth the "character of reasons" to be considered, and points out that review will be granted "only where there are special and important reasons therefor."

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[4] Counsel for petitioners, in argument before the United States Court of Appeals for the District of Columbia Circuit on January 7, 1983, conceded that the decision of this Court in *Rodriguez* v. *Compass Shipping, Ltd., supra*, overrules *Czaplicki* v. *The Hoegh Silvercloud, supra*, as applicable to the facts of this case. From recollection, the phrase used by counsel was that *Czaplicki* was "wiped out" by the 1959 amendments plus the decision of this Court in *Rodriguez*.

Respondents submit that there are no reasons in this case, and that the Petition should be denied. Petitioners point to no conflict between the decisions of the Court below and any other Federal Court of Appeals, and there is none. *See* Rule 17.1(a), Supreme Court Rules. Nor is there any conflict with the decision of a state court of last resort. *See* Rule 17.1(b), Supreme Court Rules.

The decision of the United States Court of Appeals for the District of Columbia Circuit, in this case, does not conflict with applicable decisions of this Court, nor has the Court of Appeals decided an "important question of federal law" not settled by this Court. *See* Rule 17.1(c), Supreme Court Rules.

Significantly, petitioners state directly no claim or representation, in their petition, that the decision of the District Court, upon which the *per curiam* judgment of the Court of Appeals was based, presents this Court with such conflict or unsettled question.

Petitioners refer (Petition, p. 14, note 3) to the recent Opinion of this Court in *Pallas Shipping Agency, Ltd.* v. *Duris*, #82-502, slip opinion at 3, n.1 (May 23, 1983), and claim that a citation of *Czaplicki* v. *The Hoegh Silvercloud*, *supra*, in that case is evidence of its "continuing vitality." Review of the cited footnote does not support petitioners. The citation follows a reference to § 919(c) of the Act, under which the Deputy Commissioner may be required to issue a compensation order. No conflict of interest question is raised by the facts of *Pallas Shipping Agency, Ltd.* v. *Duris*, *supra*, and the mention of *Czaplicki* in that case presents no support for the Petition filed in this case.

Petitioners also refer to *Susino* v. *Hellenic Lines. Ltd.*, 551 F. Supp. 1080 (E.D.N.Y. 1982). The District Court, in that case, omitted from its analysis any determination as to whether the facts of that case presented evidence of a conflict of interest "which Congress could not have foreseen" when it amended the Act in 1959. *Rodriguez* v. *Compass Shipping Co., Ltd.*, *supra* at 618. That omission renders the opinion of ques-

tionable value, even though counsel for defendant Hellenic Lines, Inc. has advised that appeal will not be pursued, the case having been disposed of by agreement between the parties.

Respondents submit that *Susino* v. *Hellenic Lines, Ltd., supra*, involves facts very different from the facts of this case. There, the employer and the third party were one and the same entity. Here, George Phillippi never worked for Bechtel, but worked for Ball-Healy-Granite and other contractors on the Metro subway system. The *Susino* case is therefore distinguishable on its facts, and does not lend support to petitioners here.[5]

In *Dodson* v. *Washington Automotive Company*, #81-1466, slip op., May 16, 1983, the District of Columbia Court of Appeals, in a case in which the same counsel who represents petitioners represented Mr. Dodson, affirmed a dismissal of a claim brought by an employee more than six months after an award, noting and disposing of many ancillary questions also raised in this case.

Although no conflict of interest question was presented, the Court rebuffed an argument that the six month limitation of § 933(b) violated the intent of the Act to benefit employees. The Court also discarded the employee's argument that the opinion of this Court in *Rodriguez* v. *Compass Shipping Co., Ltd., supra*, was not binding on the District of Columbia Court of Appeals.

The Court, in *Dodson*, held that all provisions of the Act are made binding in the District of Columbia by D.C. Code § 36-

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[5] In *Jones & Laughlin Steel Corporation* v. *Pfeifer*, #82-131, slip op. June 15, 1983, this Court determined that where the stevedore and the vessel owner were one and same entity, an employee who recovered compensation and made a timely claim for damages for negligence was entitled to recover both remedies. Here, it is undisputed that Bechtel is an entirely different entity from petitioner's employer, Ball-Healy-Granite.

501, and cited with approval the statement by this Court, in *Rodriguez, supra*, at 612, that the Act was designed to benefit all parties, not just employees. Indeed, petitioners here concede that the Act was intended to protect the interests of all participants (Petition at 13).

Effective July 26, 1982, the District of Columbia has a new compensation statute, D.C. Code § 36-301 et seq., (1981 ed.). The new statute, thrashed out after intense public debate, provides, in § 36-335 the same provisions found in § 33(b) of the Act.

The Council of the District of Columbia, and Congress in its oversight capacity, legislated no conflict of interest exception to the statute.

Cases cited and relied upon by petitioners do not provide any basis for this Court to grant this Petition. As pointed out in greater detail below, the decisions of the Courts below correctly interpreted the opinion of this Court in *Rodriguez* v. *Compass Shipping Co., Ltd., supra*. None of the provisions of Rule 17 of the Rules of this Court are applicable, and the Petition should be denied.

B. The Reliance Of Petitioners On The Czaplicki Decision Is Not Warranted.

Petitioners, in the District Court, and again in their appeal to the United States Court of Appeals for the District of Columbia Circuit, have conceded that the material facts submitted by defendants on the original motion in the District Court are uncontested, and have further conceded that the decision of this Court in *Rodriguez* v. *Compass Shipping, Co. Ltd., supra*, is applicable to those facts, precluding the third party action commenced by Mr. and Mrs. Phillippi since it was not brought within six months of the compensation award to the male plaintiff.

In an effort to escape the clear requirements of the statute, and the correct rationale of the decisions of the Courts below interpreting that statute, petitioners have asserted that the

clear mandate of the statute should be disregarded or suspended to allow their action to proceed. The reliance of petitioners on the 1956 decision of this Court in *Czaplicki* v. *The Hoegh Silvercloud*, *supra*, to support that assertion, is not warranted in light of legislative amendments and later decisions, particularly the decision of this Court in *Rodriguez* v. *Compass Shipping Co., Ltd.*, *supra*.

At the time Mr. Czaplicki was injured, § 33(b) of the Act provided that an employee injured in the course of employment was forced to make an election *either* to accept compensation *or* to sue a third party. If the employee elected to receive and accept a compensation award, the right to sue the third party was immediately assigned to the employer, or the subrogated compensation carrier.

In *Czaplicki*, the plaintiff elected to accept the compensation award. His right to sue third parties was thus immediately assigned to the employer, or the carrier subrogated to the employer's rights under the Act. The same carrier in that case insured one of the potential third parties. This Court, under "the peculiar facts" of the case, construed the Act, as it then existed, to allow the employee to commence a third party action in his own name despite the assignment.

This Court expressed its rationale for that decision, which is no longer applicable after the 1959 amendments, as follows:

> "*Czaplicki* can bring suit not because there has been no assignment, but because in the peculiar facts here there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action. For the same reason, we hold that the election to accept compensation, as a step toward the compensation award, does not bar this suit." 351 U.S. at 532-533.

As pointed out, when this Court next approached the subject twenty-five years later in *Rodriguez*, it found that the Court in *Czaplicki* had emphasized the limited nature of its holding at several places. *See Rodriguez* v. *Compass Shipping Co., Ltd.*, *supra*, notes 19 and 20.

Subsequent to *Czaplicki*, Congress amended Section 33 in 1959, inserting the present language and the present arrangement between employee, employer and third party. The Act was amended to make clear that the employee no longer need to make an election between acceptance of compensation and suit against a third party. Now, the employee may receive compensation and pursue his claims against third parties.[6]

In 1959, § 33(b) was amended to postpone the assignment of the right to sue third parties for six months from the date of the award. At the same time, as pointed out by petitioners, § 33(e) was modified to allow an employer or subrogated carrier to retain one-fifth of the new proceeds of a third party action successfully pursued by it, with the employee retaining four-fifths.

The legislative history of those 1959 amendments was reviewed by this Court in detail in *Rodriguez* v. *Compass Shipping Co., Ltd., supra*, 451 U.S. at 607-612, and at footnotes 21-29. That discussion makes clear that the 1959 amendments were fashioned by Congress after a review not only of the "peculiar facts" of *Czaplicki*, but also in light of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). That decision held that a third party ship owner, faced with a suit by the employee could assert a claim over for indemnity against the employer. That holding had been interpreted by the United States Court of Appeals for the Third Circuit in *Johnson* v. *Sword Line, Inc.*, 257 F. 2d 541 (1958) to create a conflict between the interest of the employer-carrier in recouping the

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[6] In the context of this case, it must be noted that George W. Phillippi was advised by his doctor of an allegedly work related pulmonary problem at least as early as June, 1978. Since the Act no longer requires that he elect between his remedies, he could have commenced this action at any time after June, 1978, and up to March 4, 1981, the last day of the six-month period which began to run with his award. This is a total period of over two and one-half years. The six month period provided by § 33(b) of the Act is, therefore, not a statute of limitations in the traditional sense.

compensation benefits paid to the employee, and their interest in avoiding the risks that their liability for indemnity might be substantially greater than the amount of those benefits.

> "The Court of Appeals reasoned that the stevedore's potential liability under the indemnity claim authorized by *Ryan Stevedoring* had the practical effect of enlarging the conflict of interest rationale of *Czaplicki*, which had narrowly rested on the peculiar facts of that case, to encompass substantially every case in whch a stevedore failed to bring a third party action." *Rodriguez* v. *Compass Shipping Co., Ltd., supra*, at 608.

The legislative history which led to the 1959 amendments clearly focused on the broader issues presented by *Ryan Stevedoring*, together with the narrower issue presented by *Czaplicki*. That history began with hearings on May 23, May 24, and June 11, 1956 before a special subcommittee of the House Committee on Education and Labor, on bills relating to the Act, during the Eighty-Fourth Congress, Second Session, hereinafter referred to as House Hearings. Those Hearings focused on various bills which eventually evolved into the 1959 amendments.

Congressman Herbert Zelenko of New York, a member of the Education and Labor Committee, and a sponsor of one of the bills, after inserting a copy of the *Ryan* decision into the record, (House Hearings at 1) testified:

> "Developments under the Act which concerned the Subcommittee on Safety and Compensation have been . . . the automatic assignment of a third party cause of action to the employer and the refusal by the employer to pursue the third party claim because of a conflict of interest . . ."

This Court in *Rodriguez, supra*, summarized the results of the 1959 amendments as follows:

> "In 1959 Congress acted to remedy the problems created by the potential conflict between the interests of the employer and the employee in prosecuting third party claims. Its solution was not to create or to define an exception to the assignment by operation of law. Rather, Congress substantially adopted the central provisions of the

Zelenko bill by amending § 33(b) to postpone the assignment by operation of law until six months after the acceptance of compensation under an award, and by amending § 33(e) to allow an employer to retain one-fifth of the net proceeds of its successful third party action. The effect of the six month provision, of course, was to give the longshoreman an unqualified right to bring a third party action during the six month period . . . Moreover, *by bringing his own action, the longshoreman could avoid the risk that his employer's potential conflict of interest—or possibly erroneous evaluation of the merits of the claim—might result in its abandonment . . .*

Nothing in the 1959 amendments purports to preserve the employee's right to commence a third party suit after the six month period expires. Although the amendments encourage employers to pursue assigned claims, they do not qualify the assignee's control of the cause of action after the assignment takes place. To the contrary, the legislative history indicates that once the six month period expires, the employer possesses complete control of third party claims.

This history forcloses the argument that Congress did not intend an assignment of a third party claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the longshoreman. The statutory language provides a different and clearly defined solution to the conflict-of-interest problem that had been created by *Ryan Stevedoring*. Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for a six month period, and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control. The simple standard set forth in § 33(b) protects the interests of both employees and employers, and is consistent with the general policy of the Act to encourage the prompt and efficient administration of compensation claims." 451 U.S. at 610-612. (Citations omitted) (Emphasis ours)

Petitioners initially conceded that, as analyzed, *Rodriguez* "undercut somewhat" the rationale of Czaplicki, in their Opposition to the Motion For Summary Judgment in the District Court. In fact, the amendments eliminated any justification for

reliance on that decision as even petitioners' counsel conceded before the Court of Appeals.

This Court was not required, on the particular facts before it in *Rodriguez*, to decide whether there were any vestiges of validity in the *Czaplicki* decision, but did make it clear that Congress, in resolving the broader conflict questions raised by *Ryan Stevedoring* also was completely aware of and resolved the narrower conflict exception set up by the "peculiar facts" of *Czaplicki*.

> "As our analysis indicates, the 1959 and 1972 amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his right against a third party where the employer failed to sue due to a conflict of interest. 351 U.S. at 532-533, 100 L.Ed. 1387, 76 S. Ct. 946. After the 1959 amendments there is such a procedure: The employee may file his own third party suit within six months after accepting compensation.
>
> Similarly, to the extent that *Czaplicki* and its progeny sought to mitigate the conflict of interest created by *Ryan Stevedoring*, the 1972 amendments eliminate the need for judicially created exception to § 33(b) . . ." 451 U.S. 617, note 41.

The legislative history makes it clear that Congress had both *Czaplicki* and *Ryan* brought to its attention while the 1959, and later the 1972 amendments were being fashioned. It is also clear that the 1959 and 1972 amendments afforded to the injured employee a procedure by which he could enforce his rights against the third party, and control the third party action, no matter how complex the contractual arrangements in which his employer and other entities might have participated, and no matter what the extent or source of the conflict of interests might be.

George W. Phillippi and his wife had control of their claim against these defendants from June 1978 until March 1981. No potential third party could have claimed a defense under

§ 933(b) of the Act if this action had been commenced against any assortment of third parties during that time, although Ball-Healy-Granite and Lumberman's Mutual could enforce a lien for compensation benefits paid pursuant to the award of Mr. Phillippi.

In overruling the decision of the Court of Appeals for the Fourth Circuit, in *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980) in which that Court had held that the employee retained a right after assignment to compel the assignee to bring a third party suit or to re-assign the cause of action to the employee, this Court held, in *Rodriguez:*

> "The predicate for the Fourth Circuit's analysis was an assumption that Congress did not intend to allow the longshoreman to lose his right against a third party simply because (a) he failed to take any action within six months, and (b) his employer decided not to sue the third party thereafter. To avoid the "practical problem" presented in such a situation, the Court fashioned a "solution" that the Act "does not specifically provide." *Id.*, at 1045. *We are persuaded that the reason Congress did not specifically provide the solution which the court readily found is that Congress did indeed intend to require the employee either to act promptly or to accept the consequences of an assignment of his claim to the employer. One of the consequences of such an assignment is the risk that the employer will choose not to sue.* The comprehensive character of the procedures outlined in the Act precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress expressly addressed. The fact that parties sometimes fail to assert meritorious claims within the period authorized by law is not a sufficient reason for refusing to enforce an unequivocal statutory bar." 451 U.S. at 613-614. (Emphasis ours)

Since the employee is afforded control of his own destiny, the conflict of interest exception has no further viability, nor is it needed to protect the employee.

Respondents submit that the decision of the Courts below is correct and the petition should be denied.

C. The Facts Of This Case Present No Specific Evidence Of An Unforeseen Conflict Of Interest.

Petitioners attempt to escape the clear dictates of the act by alleging that there is something "unique" or "complex" about the contractual relationships on the Metro subway project where plaintiff was employed, and therefore something unique about the conflict of interest issue here.

This Court, in *Rodriguez, supra*, outlined the proper question as follows:

> "The notion adopted in some post-*Czaplicki* decisions that a conflict of interest may be presumed whenever an employer does not sue on an assigned claim is simply untenable in light of the plain statutory language and the history of the 1959 and 1972 amendments. We leave for another day the question whether an assignment under § 33(b) will bar a longshoreman's third party action if there is specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended § 33." 451 U.S. at 618.

Respondents have previously pointed out that there is no question that Lumberman's Mutual Casualty Company was the compensation carrier for Ball-Healy-Granite and the liability carrier for defendants, at all relevant times. That fact was conceded and in fact referred to by the District Court. The situation is thus almost exactly parallel to the *Czaplicki* situation.

Counsel for petitioners have made these same arguments, without success, in other actions against Bechtel, where plaintiffs did not sue within six months of a compensation award.

In *Jenkins* v. *Bechtel*, Civil Action 81-2236 (D.D.C. February 23, 1982), Judge Flannery considered these arguments at length, and discarded them in granting summary judgment for Bechtel. The Opinion of Judge Flannery, from which no appeal was taken, is set forth in full in the Appendix to this Brief for Respondents.

In *Jenkins*, the Court held:

> "Finally, even if it is conceivable that the [Supreme Court] will, in the future, recognize some specific conflict of interest exceptions to § 33(b), there is scant likelihood that it will continue to recognize an exception for the precise conflict of interest involved in *Czaplicki, i.e.*, where the employer and third party have an identical insurer. The Court stated that it would postpone decision on the question of "whether an assignment under § 33(b) will bar a longshoreman's third party action if there is specific evidence of a serious conflict of interest Congress could not have *foreseen* when it enacted and amended § 33(b)." 101 S. Ct. at 1958 (emphasis added). This statement indicates that while some as yet unimagined conflict of interest *may* be found to justify an exemption from § 33(b)'s dictates, the specific conflict presented in *Czaplicki* could no longer qualify for such an exemption. The reasoning underlying this conclusion is obvious: Since *Czaplicki* predated the 1959 amendments, Congress' decision not to incorporate any exception into the revised § 33(b), reflects a clear legislative judgment that, at a minimum, the particular conflict of interest involved in *Czaplicki* should not limit the automatic and complete assignment of the employee's rights to the employer once the six-month period has expired. Since the conflict of interest motivating *Czaplicki* is the same one presented in the instant case, *Rodriguez*' statement of the issue reserved for future consideration, as well as the factors causing the Court to frame that issue in the manner it selected, necessitate the conclusion that plaintiff's suit is time-barred."

Petitioners have cited the decision of Honorable Louis F. Oberdorfer in the Court below. In granting summary judgment for defendants Bechtel, and adopting the decision by Judge Flannery in *Jenkins*, *supra*, Judge Oberdorfer went on to hold:

> "While the arrangements appear complex, there is no suggestion that their complexity was a product of any ulterior motive. They are a side effect of an ordinary

business necessity of a large undertaking." Memorandum Opinion at 3.[7]

Certainly, a conflict of interest essentially identical to that found in *Czaplicki* was foreseen and reviewed by Congress when it amended § 33. Therefore, petitioners can no longer rely on a conflict of interest exception based on *Czaplicki*, and the Petition should be denied.

D. An Employer Is Not Required To Take Any Action To Pursue An Assigned Third Party Claim.

Petitioners argue that "a strict interpretation" of § 33(b) of the Act requires an employer to take "some action" to pursue an assigned claim (Petition, pp. 16-18), and points to § 33(e)(2) as encouragement of that pursuit.

Respondents concede that § 33(e)(2) of the Act might encourage an employer, but points out that § 33(b) uses the permissive "may," not the obligatory "shall."

This Court recognized in *Rodriguez* that one of the consequences faced by an employee who does not sue the third party, and loses his case by assignment, is that the employer or subrogated carrier may not choose to bring suit. In balancing the equities between employee, employer and third party, Congress afforded complete control of his own destiny to the employee for six months.

After that time, the employee must bear the burden of a decision by the employer not to bring suit, whether that decision is based on a conflict of interest, slumbering on its rights, an independent judgment that suit is not worthwhile, or whatever other reason the employer may have, in its judgment.

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[7] In this case, Judge Oberdorfer allowed plaintiffs to conduct supplemental discovery with regard to the relationship between Bechtel, NATLSCO, WMATA and Lumberman's Mutual. The motion of defendants was granted after plaintiffs had full opportunity to supplement the record on this point. *See* Memorandum Opinion of the District Court at pages 2-3. (Petitioners Appendix C)

To engraft a conflict of interest exception, exactly parallel to the *Czaplicki* fact situation, onto the statutory scheme as reconstructed by Congress in 1959 and 1972 is unwarranted. The District Court and the Court of Appeals have properly refused to do so, and this Petition should therefore be denied.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2084

GEORGE W. PHILLIPPI and
AVA PHILLIPPI, his wife,

Petitioners

v.

BECHTEL ASSOCIATES PROFESSIONAL
CORPORATION, D.C., *et al.*,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

CERTIFICATE OF SERVICE OF RESPONDENTS' BRIEF IN OPPOSITION

This will certify that on this ____ day of July, 1983, three copies of the Respondents' Brief in Opposition were mailed, first class with postage prepaid, to William F. Mulroney, counsel of record for Petitioners.

GARY W. BROWN
(Counsel of Record)

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-2236

GEORGE H. JENKINS,

Plaintiff,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORP. *et al.*,

Defendants.

FILED
FEB 23 1982
JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

This matter comes before the court on defendant's motion for summary judgment. Defendant argues that this third-party negligence action is time-barred by section 33(b) of the Longshoremens and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 993(b)[1] because plaintiff failed to bring suit within six months after he received a compensation award. The court agrees.

FACTS

The material facts are not in dispute. Plaintiff hurt his knee on a steel pipe while performing work for his employer, Perini, Horn, Morrison-Knudson (Perini). On September 15, 1980, the Deputy Commissioner of the Office of Worker's Compensation Programs entered an order approving a compensation settlement between the plaintiff and Perini; the approved award was

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[1] The LHWCA was made applicable to the District of Columbia by D.C. Code §§ 36-501 *et seq.* (1973 Ed.).

paid in full on September 18, 1980. The instant suit against Bechtel Corporation, the general contractor charged with overseeing conditions at WMATA worksites, was filed on September 15, 1980, over six months after the Deputy Commissioner's order approving the compensation settlement.

The contract between Perini and WMATA required WMATA to provide for Perini's workmen's compensation; the insurance carrier selcted was Lumbermen's Mutual Casualty Company, a Kemper subsidiary. WMATA also secured workmens compensation insurance for Bechtel Corporation and again selected Lumbermen's. As might be expected, Lumbermen's has not initiated legal proceedings against Bechtel.

DISCUSSION

Plaintiff's opposition to defendant's motion relies primarily on *Czaplicki* v. *The S.C. Hoegh Silvercloud*, 35 U.S. 530 (1956). That case involved a factual context quite similar to the one at bar. The plaintiff was injured during his employment and elected to accept compensation benefits. Section 33(b) of the LHWCA, at that time, provided that an acceptance of a compensation award had the immediate effect of assigning any rights the employee may have against a third party to the employer. Because the employer was insured by Travelers Insurance Company, the employees rights were effectively assigned to Travelers; section 33(i) of the Act provided that the insurance company of the employer was subrogated to all of the rights of the employer.[2] Travelers was also the insurer, however, of Hamilton, one of the third parties potentially subject to suit. The result, according to the Court, was that "Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced." 350 U.S. at 530. The Court held, that in such circumstances, the employee did not irrevocably forfeit his rights against third parties by accepting a compensation award. The Court avoided the seem-

[2] Section 33(h), 33 U.S.C. § 933(h), of the modern Act is the parallel provision.

ingly unequivocal terms of section 33(b) by reading into the provision a presupposition that "the assignee's interest will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is such a recovery." *Id.* at 531.

Subsequent to *Czaplicki*, in 1959, Congress amended section 33(b) of the LHWCA. The amendment postponed the assignment of the employee's claims to the employer until six months after the acceptance of compensation:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b). At the same time, Congress modified section 33(e) to allow an employer to retain one-fifth of the net proceeds of a successful third-party action, 33 U.S.C. § 933(e), and amended section 33(a) to clarify that an employee no longer needed to make an election between his statutory right to compensation from his employer and his claim against a third party. 33 U.S.C. § 933(a).

The Supreme Court addressed the effect and meaning of the 1959 amendments for the first time in *Rodriguez* v. *Compass Shipping, Ltd.*, ___ U.S. ___, 101 S.Ct. 1945 (1981). *Rodriguez* involved three injured seaman who had accepted compensation awards from the employer-stevedore pursuant to compensation orders; more than six months later, when it became clear that the stevedores would not exercise their assigned rights, the plaintiffs brought negligence actions against the shipowner. In holding that the plaintiffs' claims were time-barred by section 33(b), the Court stressed that the 1959 Amendments provided for a mandatory assignment of the employee's rights against third parties to the employer following the passage of six months from the time of the compensa-

tion order. 101 S.Ct. at 1950. The Court noted that the legislative history of the Amendments revealed no Congressional intention to have the effectiveness of the assignment depend upon whether the employer eventually exercised the right to sue. 101 S.Ct. at 1954. The Court also rejected the contention that an inherent conflict of interest between the stevedoring company and the shipowner somehow narrowed the effect of the statutory assignment provisions.[3]

Rodriguez expressly left open the central issue involved in this case: whether a plaintiff demonstrating a specific conflict of interest, as in *Czaplicki*, retains any rights against third parties following the six-month period. 101 S.Ct. at 1958. Even so, it is clear that the Court's analysis of the 1959 Amendments and reflections on the continuing validity of *Czaplicki* compel this court to dismiss the instant suit.

First, the Court's general discussion of section 33(b), as amended in 1959, reveals its conviction that Congress intended to completely and unqualifiedly terminate an employee's rights against third parties as soon as six months elapsed from the date of an award order. For example, the Court noted that "[n]othing in the 1959 Amendments purports to preserve the employee's rights to commence a third-party suit after the 6-month period expires," 101 S.Ct. at 1959, and that "the legislative history indicates that once the 6-month period expires, the employer possesses *complete control* of third-party claims." *Id.* (Emphasis supplied). The Court further stated that "Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for

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[3] This is the conflict of interest that was created by the holding in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) that a shipowner liable to a longshoreman could assert a claim for indemnity against the employer-stevedore. Parantheticaly, this same conflict was essentially eliminated by the 1972 amendments to the LHWCA; section 5(b), as amended, terminates the vessel's rights to sue the stevedore on an indemnity theory. 33 U.S.C. § 905(b).

a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control." 101 S.Ct. at 1955. These reflections on the mandatory and unambiguous nature of the amended section 33(b) are just as pertinent to suits where the employee can demonstrate a specific conflict of interest as to situations where the conflict of interest is somehow implicit in the structure of the statute. In both cases, "[t]he meaning of § 33(b) is plain and should be respected." 101 S.Ct. at 1957.

Strong corroborative evidence for this conclusion is found in the footnote accompanying the Court's indication that it would postpone final decision on *Czaplicki's* continuing validity:

> As our analysis indicates, the 1959 and 1972 Amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his rights against a third party where the employer failed to sue due to a conflict of interest. 351 U.S., at 532-33. After the 1959 Amendments, there is such a procedure: the employer may simply file his own third-party suit within six months after accepting compensation.

101 S.Ct. at 1957 n.41. The Court evidently read the 1959 Amendments as evincing a Congressional intention to resolve the problems motivating the *Czaplicki* decision without sacrificing countervailing concerns. Instead of being compelled to accept an award which would effectively foreclose any possibility of recovery against a third party, the employee could accept an award and also sue the third party responsible for his injury. However, in order to also protect the employer's interests and avoid the confusion associated with joint control over the right to sue third parties, Congress enacted a strict six-month statute of limitations for employee suits. The Court's clear implication is that it would frustrate Congress' careful balancing of interests for the courts to continue to read into section 33(b) *any* conflict of interest exception. 101 S.Ct. at 1957 (when "interpreting the intent of Congress in fashioning various details of . . . [the] . . . legislative compromise[s]

[incorporated into the LHWCA], the wisest course is to adhere closely to what Congress has written").

Finally, even if it is conceivable that the Court will, in the future, recognize some specific conflict of interest exceptions to section 33(b), there is scant likelihood that it will continue to recognize an exception for the precise conflict of interest involved in *Czaplicki*, i.e., where the employer and third party have an identical insurer. The Court stated that it would postpone decision on the question of "whether an assignment under section 33(b) will bar a longshoreman's third-party action if there is specific evidence of a serious conflict of interest Congress *could not have foreseen* when it enacted and amended § 33(b)." 101 S.Ct. at 1958 (Emphasis added). This statement indicates that while some as yet unimagined conflict of interest *may* be found to justify an exemption from section 33(b)'s dictates, the specific conflict presented in *Czaplicki* could no longer qualify for such an exemption. The reasoning underlying this conclusion is obvious: since *Czaplicki predated* the 1959 Amendments, Congress' decision not to incorporate any exception into the revised section 33(b), reflects a clear legislative judgment that, at a minimum, the particular conflict of interest involved in *Czaplicki* should not limit the automatic and complete assignment of the employee's rights to the employer once the six-month time period has expired. Since the conflict of interest motivating *Czaplicki* is the same one presented in the instant case, *Rodriguez'* statement of the issue reserved for future consideration, as well as the factors causing the Court to frame that issue in the manner it selected, necessitate the conclusion that plaintiff's suit is time-barred.

CONCLUSION

The Supreme Court strongly implied in *Rodriguez* that the mandatory terms of section 33(b), as amended, would preclude a suit by an employee alleging any specific conflict of interest between the employer and the third party. Moreover, even if some unforeseen conflict of interest exception to section 33(b)

has survived the 1959 amendments and Rodriguez' interpretation of those amendments, it is clear that the particular conflict of interest involved in *Czaplicki* and the instant case can no longer justify such an exception. Accordingly, defendant's motion for summary judgment is granted.[4]

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

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[4] The plaintiff argues two other theories in support of his opposition which have no basis in law or fact. First, he argues that the time for filing his third-party action was tolled until he gained sufficient knowledge to support a legal claim against the defendant. Aside from the fact that *nothing* in section 33(b) provides for the tolling of the mandatory six-month time frame, plaintiff has cited no caselaw in support of his position. In contrast, the Supreme Court has recently rejected the similar argument in the Federal Tort Claims Act context that a plaintiff's failure to bring suit promptly should be excused because of his ignorance of his legal rights. *See United States* v. *Kubrick*, 444 U.S. 111 (1979). In any event, there is no evidence before the court to suggest that plaintiff did not have adequate access to factual information and legal advice with respect to potential third-party claims at the time he accepted the compensation award; thus, even if plaintiff's tolling argument has some theoretical validity, it has no applicability to the case before the court.

Second, plaintiff argues that even if his claims for compensatory damages have been assigned to his employer, he can still assert his claims for punitive damages against Bechtel. Once again, plaintiff has cited no caselaw to support this novel proposition. More importantly, it is belied by the plain language of section 33(b) which states that the employer is assigned "*all* right of the person entitled to compensation. . . ." 33 U.S.C. § 933(b) (Emphasis added).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-2236

GEORGE H. JENKINS,

Plaintiff,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORP. *et al.*,

Defendants.

FILED
FEB 23 1982
JAMES F. DAVEY, Clerk

ORDER AND JUDGMENT

This matter comes before the court on defendant's motion for summary judgment. Upon consideration of the parties' arguments and submissions, and for the reasons enumerated in the accompanying Memorandum Opinion, it is, by the court, this 23rd day of February, 1982,

ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment is granted; and it is further

ORDERED that defendant's motion to compel is denied as moot.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1615 **September Term, 1982**

Civil Action 81-01154

GEORGE W. PHILLIPPI, AVA PHILLIPPI, his wife,
Appellant,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*,

ORDER

On consideration of the motion of appellees to strike the reply brief of appellants and of the opposition thereto, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to return the reply brief of appellants to counsel.

This matter was presented to, and ruled upon by, the panel scheduled to hear argument on January 7, 1982. Circuit Practice prohibits revealing the members of the panel at this time.

For The Court

GEORGE A. FISHER, *CLERK*

By: Robert A. Bonner/s/
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

TABLE OF CONTENTS